Office - Supreme Court, U.S.
FILED
JAN 19 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1798, 80-1808, and 81-91

In the Supreme Court of the United States

OCTOBER TERM, 1981

WOELKE & ROMERO FRAMING, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

REX E. LEE
Solicitor General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
ROBERT E. ALLEN
Acting Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
LINDA SHER
Assistant General Counsel
JOHN H. FERGUSON
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether union signatory subcontracting clauses—*i.e.*, contract clauses barring subcontracting except to contractors who are signatories to agreements with particular unions—that are sought or negotiated in the context of a collective-bargaining relationship are privileged by the construction industry proviso to Section 8(e) of the National Labor Relations Act, where they are not limited in application to particular jobsites at which both union and nonunion workers are employed.

2. Whether a union violates Section 8(b)(4)(A) of the Act by picketing to obtain a union signatory subcontracting clause that is lawful under the construction industry proviso to Section 8(e).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Statement	2
A. Woelke & Romero	2
B. Pacific Northwest	5
C. The decisions of the Board	7
D. The decision of the court of appeals	8
Summary of argument	9
Argument	12
I. The construction industry proviso to Section 8(e) of the National Labor Relations Act privileges union signatory subcontracting clauses that are sought or negotiated in the context of a collective bargaining relationship and are not limited in application to particular jobsites at which both union and nonunion workers are employed	12
A. Congress was aware that secondary subcontracting agreements were part of the pattern of collective bargaining in the construction industry prior to 1959 and was urged to outlaw such agreements	14
B. Congress ultimately determined not to change the law with respect to secondary subcontracting agreements relating to the contracting of jobsite work	18
C. The construction industry proviso is part of a legislative scheme that accommodates the Act's restraints on labor organizations to the special circumstances of the construction industry while providing some limits on top-down organizing	21
1. Secondary subcontracting agreements relating to the contracting of jobsite work serve several legitimate purposes	22

2. Construing the proviso as privileging subcontracting clauses like those at issue here does not leave construction unions free to engage in unlimited top-down organizing ---------- Page 27

D. Granting proviso protection to union signatory subcontracting clauses sought or obtained in the context of a collective bargaining relationship is consistent with this Court's decision in *Connell* ---------- 31

II. Section 8(b)(4)(A) of the Act does not proscribe picketing to obtain union signatory subcontracting clauses privileged by the construction industry proviso ---------- 36

Conclusion ---------- 44

Appendix ---------- 1a

TABLE OF AUTHORITIES

Cases:

	Page
Bricklayers, Masons & Plasterers (Selby-Battersby & Co.), 117 N.L.R.B. 366, enforcement denied, 259 F.2d 151, cert. denied, 359 U.S. 952	42
Bricklayers, Masons & Plasterers (Shelby-Battersby & Co.), 125 N.L.R.B. 1179	42
Bricklayers & Stone Masons Union, Local No. 2 v. *NLRB*, 562 F.2d 775	8
Brown v. *GSA*, 425 U.S. 820	41
Building & Construction Trades Council v. *NLRB*, 328 F.2d 540	36
Building & Construction Trades Council of Philadelphia (Samuel E. Long, Inc.), 201 N.L.R.B. 321, enforced mem., 485 F.2d 680, cert. denied, 416 U.S. 937	34
Building & Construction Trades Council of Santa Barbara (Sullivan Electric Co.), 146 N.L.R.B. 1086	34
Columbia Building & Construction Trades Council (Merchandise Properties, Inc.), 149 N.L.R.B. 82, enforced *sub nom. NLRB* v. *IBEW, Local Union No. 683*, 359 F.2d 385	43
Connell Construction Co. v. *Plumbers & Steamfitters Local 100*, 483 F.2d 1154, rev'd on other grounds, 421 U.S. 616	*passim*
Construction, Production & Maintenance Laborers Union Local 383 v. *NLRB (Colson & Stevens Construction Co.)*, 137 N.L.R.B. 1650, enforcement denied in relevant part, 323 F.2d 422	36, 37, 39
Crown Cork & Seal Co., 182 N.L.R.B. 657	23
Dallas Building & Construction Trades Council v. *NLRB*, 396 F.2d 677	32, 33
Danielson v. *Joint Board of Coat, Suit & Allied Garment Workers' Union*, 494 F.2d 1230	32
Detroit Edison Co. v. *NLRB*, 440 U.S. 301	36
Donald Schriver, Inc. v. *NLRB*, 635 F.2d 859, cert. denied, No. 80-1257 (May 4, 1981), Petition for reconsideration pending	14, 23-24
Drivers Local 695 v. *NLRB*, 361 F.2d 547	14
Essex County & Vicinity Dist. Council of Carpenters v. *NLRB*, 332 F.2d 636	36, 37
Giordano Construction Co., 256 N.L.R.B. No. 10 (May 18, 1981), 107 L.R.R.M. 1164	29
Hageman Underground Construction, 253 N.L.R.B. 60	29
ILGWU v. *NLRB*, 366 U.S. 731	23

Cases—Continued

	Page
Joint Board of Coat, Suit & Allied Garment Workers' Union, 212 N.L.R.B. 735	32–33
Local 47 Teamsters Union (Texas Industries, Inc.) 112 N.L.R.B. 923, enforced, 234 F.2d 296	41, 42
Local 86, Brotherhood of Painters (Carpet Control, Inc.), 216 N.L.R.B. 1127	28
Local 357, Teamsters v. *NLRB*, 365 U.S. 667	29, 43
Local 542, Int'l Union of Operating Engineers (R. S. Noonan, Inc.), 142 N.L.R.B. 1132, enforced, 331 F.2d 99, cert. denied, 379 U.S. 889	28
Local 1104, Communication Workers of America v. *NLRB*, 520 F.2d 411, cert. denied, 423 U.S. 1051	29
Local 1976, United Brotherhood of Carpenters v. *NLRB (Sand Door)*, 357 U.S. 93	18, 37–38, 40
Los Angeles Building & Construction Trades Council (B&J Investment Co.), 214 N.L.R.B. 562	43
Los Angeles Building & Construction Trades Council (Church's Fried Chicken), 183 N.L.R.B. 1032	43
NLRB v. *Denver Building & Construction Trades Council*, 341 U.S. 675	10, 14, 25, 26, 29, 35, 40, 41
NLRB v. *Hershey Foods Corp.*, 513 F.2d 1083	29
NLRB v. *Insurance Agents' Union*, 361 U.S. 477	35
NLRB v. *Joint Council of Teamsters No. 38*, 338 F.2d 23	13
NLRB v. *Local 103, Iron Workers*, 434 U.S. 335	11, 28, 29, 34
NLRB v. *Milk Drivers' Union, Local 753*, 392 F.2d 845	13
NLRB v. *National Maritime Union*, 486 F.2d 907, cert. denied, 416 U.S. 970	13, 24
National Woodwork Mfrs. Ass'n v. *NLRB*, 386 U.S. 612	13, 18, 21, 24, 35
Northeastern Indiana Building & Construction Trades Council (Centlivre Village Apartments), 148 N.L.R.B. 854, enforcement denied on other grounds, 352 F.2d 696	36, 42–43
Northern California Chapter, The Associated General Contractors of America, Inc., 119 N.L.R.B. 1026, enforced sub nom. *Operating Engineers Local 3* v. *NLRB*, 266 F.2d 905, cert. denied, 361 U.S. 834	17

Cases—Continued Page
Orange Belt Dist. Council of Painters No. 48 v. *NLRB*, 328 F.2d 534 ---- 36
Radio Officers' Union v. *NLRB*, 347 U.S. 17 ---- 29
Sears, Roebuck & Co. v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180 ---- 28
Walsh v. *Schlecht*, 429 U.S. 401 ---- 25
Statutes:
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
Section 7, 29 U.S.C. 157 ---- 34
Section 8(a)(3), 29 U.S.C. 158(a)(3) ---- 29
Section 8(a)(5), 29 U.S.C. 158(a)(5) ---- 38
Section 8(b)(2), 29 U.S.C. 158(b)(2) ---- 29
Section 8(b)(3), 29 U.S.C. 158(b)(3) ---- 38
Section 8(b)(4)(A), 29, U.S.C. 158(b)(4)(A) - *passim*, 1a
Section 8(b)(4)(B), 29 U.S.C. 158(b)(4)(B) --- 8, 33, 38, 39, 42, 1a
Section 8(b)(7), 29 U.S.C. 158(b)(7) ---- 32, 34, 40
Section 8(b)(7)(C), 29 U.S.C. 158(b)(7)(C) --- 11, 21, 28, 33, 34, 43
Section 8(e), 29 U.S.C. 158(e) ---- *passim*, 1a–2a
Section 8(f), 29 U.S.C. 158(f) ---- 10, 11, 21, 23, 28, 30, 31, 43, 2a–3a
Section 9(a), 29 U.S.C. 159(a) ---- 28, 31, 34, 43
Section 10(e), 29 U.S.C. 160(e) ---- 36
Labor Management Relations Act of 1947 (Taft-Hartley Act), 29 U.S.C. 141 *et seq.*:
Section 8(b)(4)(A), 29 U.S.C. (1958 ed.) 158(b)(4)(A) ---- 38, 42
Section 302, 29 U.S.C. 186 ---- 25
Pub. L. No. 86–257, 73 Stat. 543–544 ---- 12–13
Miscellaneous:
Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 1086 (1960) ---- 20
104 Cong. Rec. 11308 (1958) ---- 28
105 Cong. Rec. (1959):
p. 6556 ---- 18
p. 6730 ---- 38
p. 14343 ---- 19
p. 14347 ---- 39
p. 15541 ---- 26
p. 15545 ---- 39

Miscellaneous—Continued Page
pp. 15551–15552 26
p. 15852 26
p. 15890 38
p. 16590 19
pp. 17325–17328 39
pp. 17333–17334 39
p. 17881 26
p. 17898 19
p. 17899 20
p. 17900 20, 40
p. 18128 20, 28, 41
pp. 18134–18135 28
p. 18135 20
p. 19772 20, 29–30
p. 20005 25
H.R. 8342, 86th Cong., 1st Sess. (1959) (the Elliott bill) 18, 25
H.R. 8400, 86th Cong., 1st Sess. (1959) 19, 38
H.R. Rep. No. 741, 86th Cong., 1st Sess. (1959) 19, 22, 23, 42
H.R. Rep. No. 1147, 86th Cong., 1st Sess. (1959) 20, 23, 28, 29, 39, 40
Lunden, *Subcontracting Clauses in Major Contracts—Part I*, 84 Monthly Lab. Rev. 579 (1961) 15
Lunden, *Subcontracting Clauses in Major Contracts—Part II*, 84 Monthly Lab. Rev. 715 (1961) 15
Labor-Management Reform Legislation: Hearings on H.R. 3540, H.R. 3302, H.R. 4473, and H.R. 4474 Before a Joint Subcomm. of the House Comm. on Education and Labor, 86th Cong., 1st Sess. (1959) 16–17, 19, 22, 23, 28
Labor Management Reform Legislation: Hearings on S. 505, S. 748, S. 76, S. 1002, S. 1137, and S. 1311 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 86th Cong., 1st Sess. (1959) 15–16, 22, 23, 28
Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959):
vol. I *passim*
vol. II *passim*
Pierson, *Building Trades Bargaining Plan in Southern California*, 70 Monthly Labor Review 14 (1950) 15

Miscellaneous—Continued Page

S. 1555, 86th Cong., 1st Sess. (1959) ---------- 38

Senate Committee Section-by-Section Analysis, 86th Cong., 1st Sess. (1959) ---------- 37

S. Rep. No. 187, 86th Cong., 1st Sess. (1959) ---------- 22, 23

S. Res. 181, 86th Cong., 1st Sess. (1959) ---------- 39

To amend the National Labor Relations Act, 1947, with Respect to the Building and Construction Industry: Hearings on S. 1973 Before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare, 82d Cong., 1st Sess. (1951) ---------- 22

164-739 O - 83 - 2

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 80–1798

WOELKE & ROMERO FRAMING, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

No. 80–1808

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 81–91

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the en banc court of appeals (W. & R. Pet. App. 1–52) is reported at 654 F.2d 1301.[1] That opinion reviewed

[1] The case was heard and decided by an 11-member en banc panel in accordance with the Act of Oct. 20, 1978, Pub. L. No. 95–486, Section 6, 92 Stat. 1633, and Rule 25 of the Rules of the Ninth Circuit.

two related National Labor Relations Board cases consolidated for hearing and decision in the court of appeals. The decision and order of the Board in *Carpenters Local No. 944 (Woelke & Romero Framing, Inc.)* (W. & R Pet. App. 71–103), a case in which petitioner in No. 80–1798 was a party, are reported at 239 N.L.R.B. 241. The decision and order of the Board in *International Union of Operating Engineers, Local No. 701 (Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.)* (P.N.W. Pet. App. A–147 to A–182), a case in which petitioners in Nos. 80–1808 and 81–91 were parties, are reported at 239 N.L.R.B. 274.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1981 (W. & R. Pet. App. 1). The petitions for a writ of certiorari in Nos. 80–1798 and 80–1808 were filed on April 29, 1981, and that in No. 81–91 was filed on July 14, 1981. The three petitions were granted and the cases consolidated on October 5, 1981 (J.A. I 97–98). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth in the Appendix, *infra*, 1a–3a.

STATEMENT

A. *Woelke & Romero*

From July 5, 1974, to June 15, 1977, petitioner Woelke & Romero Framing, Inc. ("Woelke"), a framing subcontractor in the construction industry in southern California, was party to a collective-bargaining agreement with the United Brotherhood of Carpenters and Joiners of America, AFL–CIO ("Carpenters") (W. & R. Pet. App. 76; J.A. I 17).

Since at least 1941, collective bargaining agreements like the one to which Woelke was a party—a master labor agreement ("MLA") establishing the terms and conditions of employment for union-represented carpenters working in 11 southern California counties—have been in effect in California (J.A. I 17, 20, 26–66). In practice, contractors signatory to the Car-

penters' MLA either themselves hire carpenters, in accordance with the union referral provisions in the agreement, or subcontract the work to employers who are also signatory to the MLA and will hire and employ carpenters in accordance with those provisions (J.A. I 20.[2] Carpenters has represented between 57,000 and 69,000 carpenters under these agreements since 1946 (J.A. I 21). Since 1959, some 850 contractors—bargaining through two different employer associations—have been signatory to the MLA; in addition, over the years some 4000 independent contractors, not members of one of the multiemployer associations, have become parties to the MLA by virtue of their individually executing so-called "short-form" agreements (J.A. I 21–22). The majority of the carpenters working under the MLA work for more than one signatory employer in any given year and work for numerous signatory employers in the course of their careers (J.A. I 19–20).

In June 1977, shortly before their current agreement was to expire, Woelke and Carpenters commenced bargaining for the purpose of negotiating a successor agreement. In August 1977, however, the parties reached an impasse over, *inter alia*, Carpenters' demand for a union signatory subcontracting clause, *i.e.*, a clause that prohibited Woelke from subcontracting work at any construction jobsite "except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate union, or subordinate body signatory to this Agreement" (W. & R. Pet. App. 77–78, 79; J.A. I 18, 85–90).[3]

---

[2] The relevant portions of the exclusive referral provisions in the 1974–1977 MLA are set forth at J.A. I 37–38.

[3] The union contract proposals reprinted in the Board's decision (W. & R. Pet. App. 78–81) and in petitioner's brief (W. & R. Br. 6–7) do not appear in that precise form in the stipulated record (J.A. I 85–90), but the differences are inconsequential. Thus, the parties stipulated that the subcontracting proposal at issue is "set forth below in Exhibit E attached hereto" (J.A. I 18). The relevant portions of Exhibit E—reprinted at J.A. I 84–90—reveal, however, that Carpenters' actual proposal was not in final form but contained shorthand references such as (J.A. I 88):

103.2 As is in MLA (except renumbered to 103.5.).

103.3 As is in MLA (except renumbered to 103.6.).

For convenience, the Board and petitioner have reprinted the old provisions, with their new number. This is also how the provisions were set forth in the complaint (J.A. I 6–7).

The stated purposes of Carpenters' subcontracting proposal were "to preserve and protect the work opportunities normally available to employees * * * covered by this Agreement"; to maintain and protect "standards and benefits of employees * * * negotiated over many years"; and to preserve "the right of union employees, employed hereunder, from being compelled to work with non-union workmen" (W. & R. Pet. App. 78; J.A. I 85). In pertinent part, the proposed clause stated (W. & R. Pet. App. 79; J.A. I 86):

> 103.2. The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use), except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreemen[t.[4]]

In addition to the subcontracting clauses, the MLA which Carpenters sought to renew, as amended,[5] contained provisions recognizing Carpenters as the exclusive bargaining representative of employees working under the agreement (J.A. I 35) and detailing the rules governing such subjects as working hours (J.A. I 42–46), reporting pay (J.A. I 46), travel, subsistence, and parking (J.A. I 47–48, 53), meal periods (J.A. I 49), wage rates and payments procedures (J.A. I 49–50, 55–58), piecework rates and procedures in residential construction (J.A. I 63–66), maintenance and security for tools, efficiency on the job, and safety (J.A. I 41, 52–55), and contributions to jointly administered multiemployer trust funds providing health care benefits, pensions, and vacation pay to employees

---

[4] The expiring contract contained a union signatory subcontracting clause (Section 103) that was differently worded but, so far as relevant here, was similar in effect (J.A. I 28).

[5] Exhibit C, a 22-page document detailing the various amendments to the MLA that the Carpenters initially proposed (see J.A. I 18), has not been reprinted in the appendix; the references to the subjects covered by the MLA are to the 1974–1977 MLA.

working under the agreement (J.A. I 59–63). The MLA also contains, as noted (page 3, note 2, *supra*), provisions requiring signatory employers to obtain their employees from the union-maintained hiring hall in accordance with its nondiscriminatory procedures.[6]

In support of these proposals and other demands, two Carpenters locals picketed Woelke's construction sites, causing work stoppages by other employees at certain of the sites (W. & R. Pet. App 81; J.A. I 19). Woelke filed unfair labor practice charges with the Board, asserting, *inter alia*, that the proposed restriction on its subcontracting prerogatives violated the proscription in Section 8(e) of the National Labor Relations Act ("the Act"), 29 U.S.C. 158(e), against secondary agreements, and that, therefore, Carpenters' picketing in support of that restriction violated Section 8(b)(4)(A) of the Act, 29 U.S.C. 158(b)(4)(A) (W. & R. Pet. App. 71, 81–82).

B. *Pacific Northwest*

The Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. ("Oregon AGC"), an association of approximately two hundred construction industry employers in Oregon and southwest Washington, has been a party to a collective bargaining agreement with Local 701 of the International Union of Operating Engineers, AFL–CIO ("Engineers") for many years (J.A. II 9, 11–12). Since 1960, the parties' collective bargaining agreement has contained a union signatory subcontracting clause, prohibiting Oregon AGC from subcontracting construction jobsite work "to any person, firm or company who does not have an existing labor agreement with the [Engineers] Union covering such work"

[6] Woelke's counterproposals (J.A. I 67–83) contained no limitation on subcontracting and sought to remove the existing requirement that the employer look to the union-operated hiring hall as its source of labor by making use of the union hall optional (J.A. I 70–71). Further, Woelke's proposal made no provision for a pension plan and proposed an individual employer health care plan (J.A. I 73–74) in lieu of the multi-employer plan in the MLA, thereby tying eligibility to continued employment with Woelke and eliminating the "portable benefit" feature of the existing plan.

(J.A. II 910, 12) The clause in the 1975–1980 contract provides (J.A. II 9–10):

> Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting, or repair of a building, structure, not have an existing labor agreement with the Union or other work to any person, firm or company who does covering such work.

In addition, the agreement authorized Engineers to take "such action as they deem necessary"—including strikes and other economic self-help—to enforce awards or resolutions obtained through the grievance and arbitration process on matters covered by the agreement (J.A. II 10). One of the Engineers' objectives respecting the subcontracting clause was to preserve work opportunities for its members with Oregon AGC contractors (J.A. II 11–12). The collective bargaining agreement as a whole is designed to stabilize working conditions in the area by establishing uniform rates of pay and working conditions among all employers (J.A. II 16).

Like the agreement in *Woelke*, the Oregon AGC-Engineers agreement grants the union recognition as the exclusive representative of the employees working under the agreement (J.A. II 15), and it contains the same range of provisions regulating the details of the employees' working life (J.A. II 13–14, 25–28). Similarly, it requires contributions to jointly-administered fringe benefit trust funds providing health, pension, and vacation benefits to employees working for signatory employers (J.A. II 29–31). The agreement also contains provisions requiring signatory employers to obtain their employees from the union-operated hiring hall in accordance with a nondiscriminatory system of referral priorities (J.A. II 17–24).

In April 1977, petitioner Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. ("Pacific Northwest"), filed with the Board unfair labor practice charges asserting, *inter alia*, that the Oregon AGC/Engineers contract violated the proscription against secondary agreements con-

tained in Section 8(e) of the Act (P.N.W. Pet. App. A–6, A–147 to A–148, A–159).[7]

C. The Decisions of the Board

The Board agreed (W. & R. Pet. App. 84–90; P.N.W. Pet. App. A–161 to A–164) with petitioners' contention that the union signatory subcontracting clauses at issue were secondary in thrust and therefore violative of Section 8(e) of the Act, unless saved by the construction industry proviso to that Section. The Board, however, rejected the contention that the clauses were not saved by the proviso, explaining (W. & R. Pet. App. 90):

> Since the enactment of the 1959 amendments to the Act, the Board and the courts have consistently upheld contract provisions between employers and unions in the construction industry which permit the employer to subcontract work to be performed at the site of the construction only to subcontractors who are signatory to contracts either with a particular union or with unions having jurisdiction over the type of work involved.

Nor, in the Board's view, did this Court's decision in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), require the conclusion that the clauses here are excluded from the proviso's protection because they are not limited in application to particular jobsites at which both union and nonunion workers are employed. Rather, the Board held (W. & R. Pet. App. 97) that the construction industry proviso, as construed in *Connell*, permits subcontracting clauses like those here, where they are sought or negotiated "in the context of a collective-bargaining relationship." Finding that the subcontracting clauses here were in fact sought or negotiated in the context of "collective-bargaining relation-

[7] Petitioner Oregon AGC was technically a respondent in the Board proceeding (P.N.W. Pet. App. A–148), but it supported the position of the General Counsel and Pacific Northwest, the charging party, that the subcontracting provision violated Section 8(e) of the Act (*id.* at A–159).

384-739 O - 82 - 3

ship[s]," the Board concluded (W. & R. Pet. App. 98; J.A. II 39) that they were protected by the proviso and therefore lawful under Section 8(e) of the Act.

Accordingly, the Board dismissed (W. & R. Pet. App. 98) Woelke's claim that Carpenters' picketing in support of its subcontracting proposal (*i.e.*, picketing to *secure* a subcontracting clause) violated Section 8(b)(4)(A) of the Act. However, the Board (Chairman Fanning dissenting) determined (P.N.W. Pet. App. A–165 to A–175) that the subcontracting clause at issue in *Pacific Northwest* lost the protection of the construction industry proviso—and hence violated Section 8(e)—because of the provision in the Oregon AGC/Engineers contract permitting the union to resort to economic action if signatory employers failed to comply with grievance-arbitration decisions on any contractual matter, including the subcontracting restriction, *i.e.*, because the contract permitted strikes or picketing to *enforce* the subcontracting clause.[8] The Board ordered (*id.* at A–177 to A–180) Oregon AGC and Engineers to cease and desist from maintaining the unlawful provision and to post appropriate notices.[9]

D. The Decision of the Court of Appeals

An 11-member en banc panel of the court of appeals (see page 1 note 1, *supra*), by a 7–4 vote, upheld the Board's conclusion that union signatory subcontracting clauses like those at issue here are privileged by the construction industry proviso to Section 8(e) where they are "arrived at in the context of collective bargaining relationships" (W. & R. Pet. App. 38). Rejecting petitioners' contention that such clauses are violative of Section 8(e) unless restricted in application to particular jobsites

[8] A subcontracting agreement loses the protection of the construction industry proviso if it contains terms that sanction strikes or other self-help measures in the event subcontracting in violation of the agreement occurs, because carrying out such measures would violate Section 8(b)(4)(B) of the Act, 29 U.S.C. 158(b)(4)(B). See *Bricklayers & Stone Masons Union, Local No. 2* v. *NLRB*, 562 F.2d 775, 787–788 (D.C. Cir. 1977).

[9] The court below enforced (P.N.W. Pet. App. A–66 to A–70) the Board's order in this respect, and no question with respect to that issue is raised here.

and particular times at which the contracting employers have union members present, the court found (W. & R. Pet. App. 26–37) that the legitimate purpose of subcontracting clauses was not only to avoid jobsite "friction" between union and nonunion workers, but also to protect contract standards that might otherwise be jeopardized because of the unique transitory nature of the employment relationship in the construction industry.[10]

SUMMARY OF ARGUMENT

I

A. In 1959, when it enacted the construction industry proviso to Section 8(e) of the Act, 29 U.S.C. 158(e), Congress was aware that union signatory subcontracting clauses—*i.e.*, contract clauses barring the subcontracting of construction site work except to firms who are signatory to the applicable union collective bargaining agreement—were part of the pattern of

[10] The dissenting judges (W. & R. Pet. App. 44–52) adhered to the view of the original three-judge panel (W. & R. Pet. App. 53–70) that the purpose of the proviso was only to avoid jobsite "friction" between union and nonunion workers.

bargaining in the construction industry. Congress was urged by firms boycotted by such clauses to outlaw them. Although the House passed a bill that would have had this effect, the Senate refused to agree. And, in the conference, the House acquiesced in the enactment of a proviso designed to preserve the status quo with respect to agreements relating to the contracting of work to be performed on a construction site.

B. Although the construction industry proviso to Section 8(e) was apparently enacted in part to forestall the jobsite friction which resulted from having union and nonunion employees working together on the same jobsite (see *NLRB* v. *Denver Building & Construction Trade Council*, 341 U.S. 675 (1951)), this was not its only purpose. Congress enacted the proviso principally in order to avoid disrupting the existing pattern of collective bargaining in the construction industry.

Thus, because in the construction industry employees are not typically attached to a single employer, but work for various contractors or subcontractors in turn, construction unions acting on behalf of the pool of employees desirous of union representation traditionally have negotiated pre-hire agreements setting forth the terms and conditions upon which union labor would be supplied to employers in a particular geographic area. In Section 8(f) of the Act, Congress authorized construction unions to continue to negotiate pre-hire agreements that would otherwise run afoul of the Act's proscriptions against recognition and bargaining with unions that have not yet established their majority status. And, by simultaneously enacting the construction industry proviso to Section 8(e)—thereby permitting contract clauses requiring that all construction site work be performed by contractors who are bound to honor the terms of the applicable area-wide agreement with the appropriate union—Congress preserved the means that employers and unions in that industry have adopted for insuring not only that labor relations on particular jobsites are harmonious, but also that the pool of workers represented by the union will en-

joy the opportunities for regular employment and the continuity in wages, fringe benefits, and other terms and conditions of employment enjoyed by employees in more stable industries.

C. Construing the proviso as privileging subcontracting clauses, like those here, that are sought or negotiated in the context of a collective bargaining relationship, but that are not limited in application to particular jobsites where union and nonunion employees working together, does not leave construction unions free to engage in unlimited top-down organizing. A subcontractor cannot be subjected to extended picketing to force it to enter into a union agreement regardless of the wishes of its employees. Unless the picketing union files an election petition within a reasonable period of time, not to exceed 30 days, such picketing would violate Section 8(b)(7)(C) of the Act. Moreover, should the subcontractor enter into a pre-hire agreement with the union, the express terms of Section 8(f) of the Act permit the employees to challenge the union's representative status by filing an election petition with the Board. And, the subcontractor itself, if it does not have a stable workforce among whom the union has secured a majority, is free under the Act to repudiate the agreement at any project on which the union has not demonstrated that it represents a majority of its employees. See *NLRB* v. *Local 103, Iron Workers*, 434 U.S. 335 (1978).

D. Granting proviso protection to union signatory clauses sought or obtained in the context of a collective bargaining relationship is consistent with this Court's decision in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). In *Connell*, the Court was confronted with a novel organizational tactic: "stranger" picketing aimed at pressuring selected employers to enter into an agreement with a single term—a union signatory subcontracting clause falling within the literal terms of the construction industry proviso—and deliberately designed to circumvent the new restrictions

on organizational picketing that Congress enacted in 1959. While the Court construed the construction industry proviso as not privileging a union signatory subcontracting clause in that situation, it specifically recognized that the proviso would privilege such a clause where, as here, it was sought or obtained "in the context of collective-bargaining relationships" (421 U.S. at 633).

II

The express terms of Section 8(b)(4)(A), 29 U.S.C. 158 (b)(4)(A), of the Act prohibit coercing any person "to enter into any agreement which is prohibited by section 8(e)." Accordingly, as every court of appeals which has considered the question has held, it is not a violation of Section 8(b)(4)(A) for construction unions to picket for union signatory subcontracting clauses in their collective bargaining agreements which are privileged by the construction industry proviso to Section 8(e). Congress believed, correctly, that this was the state of the law at the time of the 1959 amendments and it declined to pass measures that would have changed the law in this respect.

ARGUMENT

I. THE CONSTRUCTION INDUSTRY PROVISO TO SECTION 8(e) OF THE NATIONAL LABOR RELATIONS ACT PRIVILEGES UNION SIGNATORY SUBCONTRACTING CLAUSES THAT ARE SOUGHT OR NEGOTIATED IN THE CONTEXT OF A COLLECTIVE BARGAINING RELATIONSHIP AND ARE NOT LIMITED IN APPLICATION TO PARTICULAR JOBSITES AT WHICH BOTH UNION AND NONUNION WORKERS ARE EMPLOYED

Section 8(e) of the National Labor Relations Act, was added to the Act in 1959 by the Landrum-Griffin Amendments. Pub. L. No. 86-257, 73 Stat. 543-544, now codified at 29 U.S.C. 158(e). The Section was added to strengthen the secondary

boycott prohibitions in the Act[11] and it has been construed to ban union signatory subcontracting clauses—that is, contract clauses barring subcontracting except to contractors who are signatories to agreements wth particular unions.[12]

The construction industry proviso to Section 8(e) states, however, that "nothing in * * * [subsection (e)] shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of * * * construction * * *."The issue here is whether the union signatory subcontracting clauses sought or obtained by the unions through collective bargaining are within the construction industry proviso and thus saved from the ban of Section 8(e).

Read literally, the proviso's exemption for secondary subcontracting agreements plainly encompasses these agreements, since they relate to the contracting of construction site work, and, by the express terms of the statute, "nothing" in Section 8(e) applies to such agreements. Further, during the more than 20 years since the enactment of Section 8(e), the Board, with court approval, has recognized that union signatory subcontracting clauses of the sort sought or obtained by the unions here come within its broad language (W. & R. Pet. App. 90–92). In *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), this Court cautioned, however, that the construction industry proviso may not be applied literally where to do so would frustrate Congress' purpose (*id.* at 628–633); and the Court held that, in order to qualify for immunity under the proviso, agreements relating to the contracting of jobsite work must (with one possible exception

[11] *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 635–639, 644–645 (1967).

[12] *NLRB* v. *Joint Council of Teamsters No. 38*, 338 F.2d 23, 28 (9th Cir. 1964); *NLRB* v. *Milk Drivers' Union, Local 753*, 392 F.2d 845, 847 (7th Cir. 1968); *NLRB* v. *National Maritime Union*, 486 F.2d 907 (2d Cir. 1973), cert. denied, 416 U.S. 970 (1974).

the Court did not find it necessary to decide) arise in the context of collective bargaining relationships (*id.* at 633).[13]

The subcontracting clauses at issue here were sought or negotiated in the context of valid collective bargaining relationships, and to this extent satisfy *Connell*. Petitioners challenge the clauses, however, on the basis of their view that the immunity afforded by the literal terms of the proviso must be further limited in light of the suggestion in *Connell* that the function of the proviso was " ' to alleviate the frictions that may arise when union men work continuously alongside nonunion men on the same construction site' " (421 U.S. at 630, quoting *Drivers Local 695* v. *NLRB*, 361 F.2d 547, 553 (D.C. Cir. 1966)). If this were the only purpose of the proviso, union signatory subcontracting clauses not focused solely on preventing the simultaneous employment of union and nonunion workers on the same construction site would be outside the exemption. The Board, the court below, and the only other court of appeals to decide the issue [14] have rejected such a narrow interpretation of the proviso, concluding instead that it protects all union signatory clauses regulating the contracting of jobsite construction work where those clauses are sought or obtained in the context of a valid collective bargaining relationship. We shall show that an examination of the construction industry proviso, "in light of the statutory setting and the circumstances surrounding its enactment" (*Connell Construction Co.* v. *Plumbers & Steamfitters Local 100, supra*, 421 U.S. at 628), supports that conclusion.

A. Congress Was Aware that Secondary Subcontracting Agreements Were Part of the Pattern of Collective Bargaining in the Construction Industry Prior to 1959 and Was Urged to Outlaw Such Agreements

The Congress that enacted the construction industry proviso in 1959 was aware that agreements limiting subcontracts of

---

[13] The Court added that, "in light of congressional references to the *Denver Building Trades* problem," the proviso applied "possibly to common-situs relationships on particular jobsites as well" (*ibid.*). See *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675 (1951) (discussed *infra*, pages 25–27).

[14] *Donald Schriver, Inc.* v. *NLRB*, 635 F.2d 859 (D.C. Cir. 1980), cert. denied, No. 80–1257 (May 4, 1981), petition for reconsideration pending.

construction site work to firms that bound themselves to honor all the terms of the applicable collective bargaining agreement with a particular union were part of the pattern of bargaining in the construction industry prior to 1959.[15]

It was urged to pass legislation that would outlaw such agreements, and it was presented with many of the same policy arguments that petitioners now urge in opposition to like agreements.

Thus, Senator Curtis proposed legislation to close the loopholes in the existing protections against secondary boycotts; and, testifying before the Senate Labor Committee, he urged it to outlaw the making of "the so-called hot cargo secondary boycott clauses now used so extensively by the Teamsters and the Building Trades unions." *Labor-Management Reform Legislation: Hearings on S. 505, S. 748, S. 76, S. 1002, S. 1137, and S. 1311 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 86th Con., 1st Sess. 752

---

[15] The type of master labor agreement that Carpenters was picketing Woelke & Romero to sign—namely, a comprehensive agreement establishing the basic employment conditions for construction workers in a broad geographic area and including a provision that work could be subcontracted only to employers who were willing to observe all the terms of the agreement (J.A. I 26–66, 84–90)—has been part of the pattern of bargaining in Southern California, where the *Woelke & Romero* case arose, since 1941. See Pierson, *Building Trades Bargaining Plan in Southern California*, 70 Monthly Lab. Rev. 14, 17 (1950). The effect of the agreement is that the thousands of workers employed under it enjoy uniform working conditions as they move from job to job and employer to employer—the pattern typical of the construction industry. *Id.* at 14, 15. The Pierson study noted that similar bargaining arrangements also existed in certain other localities, including the Portland, Oregon, area, where the *Pacific Northwest Chapter* case arose. *Id.* at 15. The collective bargaining agreement between the Engineers and the Oregon AGC is also of this sort (J.A. II 13–31).

See also Lunden, *Subcontracting Clauses in Major Contracts—Part I*, 84 Monthly Lab. Rev. 579 (1961). Of the more than 700,000 construction workers working under the 155 construction contracts examined in the Lunden study, some 444,000 worked under contracts with subcontracting provisions (*id.* at 582), and, although the terms of these provisions varied, the most common required contractors to agree to subcontract work only to subcontractors who would apply all the "terms and conditions" of the master agreement. Lunden, *Subcontracting Clauses in Major Contracts—Part II*, 84 Monthly Lab. Rev. 715–716 (1961).

366-739 O - 62 - 4

(1959), hereinafter *"Senate Hearings."* He stated that, among the building trades unions, "these types of boycott clauses are known as standard form of agreement clauses" (*ibid.*). Adverting to the pressure such agreements placed on nonunion employees—the "top-down" organizing effect objected to by the employer representatives here—Senator Curtis warned that, through such clauses, "the unions sought to force all unionized contractors not to do business *with contractors whose employees did not want to join the building trades union"* (*ibid.;* emphasis supplied).

The House Labor Committee heard similar testimony. Representatives of an independent union and of an employer complained that, under existing law, employers and unions could lawfully enter into union signatory subcontracting clauses, and, because of these agreements, employers whose employees had selected another union were denied any opportunity to compete for construction jobs. *Labor-Management Reform Legislation: Hearings on H.R. 3540, H.R. 3302, H.R. 4473, and H.R. 4474 Before a Joint Subcomm. of the House Comm. on Education and Labor,* 86th Cong., 1st Sess. 2363 (1959) (hereinafter *"House Hearings"*) (statement of Howard S. Lane); *House Hearings* 2365 (statement of Edward M. Carlton). As a representative of a California construction engineering subcontractor testified before the House Labor Committee (*id.* at 2366 (statement of Edward M. Carlton)):

> The contract [between the AGC and the Operating Engineers] contains a clause which is referred to in the industy as the subcontractor clause. In effect, that clause says that any time an AGC contractor subcontracts work [falling within that trade] the subcontractor must agree to apply the terms and conditions of the AGC Operating Engineers' agreement to his employees. This, of course, means that the subcontractor's employees must become members of [the] Operating Engineers * * *.

Criticizing the alleged anti-competitive and the top-down organizing effects of these subcontracting clauses, the witness continued (*ibid.*):

> The practical effect of all of this has been to freeze out of approximately 90 percent of all available building and construction work in a huge geographical area, the

> employees of the specialty subcontractors * * * who have a contract with an independent union and who cannot lawfully make their employees join an Operating Engineers Union, or force upon their employees the terms and conditions of employment established by the Operating Engineers Union.

The 1959 Congress was not only aware of the extensive use of these subcontracting clauses, but was also informed that the Board and the courts had found them lawful. Thus, the employer representative who described the Operating Engineers' clause and its alleged evils, also testified that both the Board and the reviewing court had upheld the clause. When members of the House Labor Committee inquired about these decisions, the labor consultant to the Committee's minority members reported that the subcontracting clause had been found lawful by the Court of Appeals for the District of Columbia Circuit. *House Hearings* 2368.[16]

---

[16] See *Northern California Chapter, The Associated General Contractors of America, Inc.*, 119 N.L.R.B. 1026 (1957), enforced *sub. nom. Operating Engineers Local 3* v. *NLRB*, 266 F.2d (D.C. Cir.), cert. denied, 361 U.S. 834 (1959). The text of the court of appeals decision had been introduced into the record of the House hearings by an earlier witness. *House Hearings* 801, 803–807 (statement of Paul H. Robbins). The court, *inter alia*, upheld the Board's finding that a prime contractor (AGC) did not violate the Act by deciding, in compliance with the subcontracting clause of its agreement with the Operating Engineers, not to subcontract engineering work to a firm (Musser) that could not itself observe the terms of the AGC-Engineers agreement. (Musser could not observe the union-security provisions because its employees belonged to a different union.) See 266 F.2d at 907–908, 909–910.

In contrast to the present AGC position, the arguments of two AGC chapters before the Board in the Musser case—not long before Congress took up the 1959 amendments—included a strong defense of broad subcontracting clauses executed in a collective bargaining context. The chapters explained (119 N.L.R.B. at 1054): "[S]uch clauses have fostered and maintained stability in the construction industry in the 46-county area, and * * * a holding that the current subcontractors' clause is invalid 'would cause instability in labor-management relations' in the industry 'and would burden and obstruct commerce'." As an amicus in the present case makes clear (Georgia Power Co. Br. 8–10), the earlier AGC position remains an accurate commentary on the practical value of these clauses.

B. Congress Ultimately Determined Not to Change the Law With Respect to Secondary Subcontracting Agreements Relating to the Contracting of Jobsite Work

Although, as shown, Congress was aware of the use of secondary subcontracting clauses in the construction industry and of the principal arguments for prohibiting such clauses, it was more concerned about so-called "hot-cargo" agreements—that is, contract clauses binding the employer to boycott products manufactured by another employer with whom the union had a dispute. As explained in *National Woodwork Mfrs. Ass'n* v. *NLRB*, *supra*, 386 U.S. at 634–637, Congress was aware that under then-existing law (*Local 1976, United Brotherhood of Carpenters* v. *NLRB* (*Sand Door*), 357 U.S. 93, 98–99 (1958)), it was not unlawful for employers and unions to enter into agreements permitting employees to refuse to handle or otherwise deal with products made by other employers with whom the union had a dispute; and it regarded this implication of *Sand Door* as an undesirable loophole in the existing protections against secondary boycotts. Furthermore, a series of Senate hearings in 1958 revealed that the Teamsters Union, in particular, had used its economic leverage in the trucking industry to obtain such "hot cargo" clauses from common carrier employers and that these clauses had "conscripted neutral employers in Teamsters organizational campaigns" (*National Woodwork Mfrs. Ass'n* v. *NLRB*, *supra*, 386 U.S. at 634).

As originally conceived, the amendments that became Section 8(e) were limited to ending the abuses associated with hot cargo agreements in the trucking industry. In response to criticism of the bill that had been reported out by the Senate committee without addressing the problem of hot cargo agreements, Senator Gore introduced an amendment on the floor that had the effect of outlawing such agreements only in the trucking industry. 105 Cong. Rec. 6556 (1959), II Leg. Hist. 1161–1162.[17] The House Labor Committee initially reported out a bill containing a substantially identical provision. H.R. 8342, 86th Cong., 1st Sess. § 705(a)(2) (1959) (Elliott bill), I Leg. Hist. 755.

[17] "Leg. Hist." refers to the two-volume Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959).

Sharp differences arose as to the proper scope of the proposed reform. Nine members of the House Labor Committee dissented from the report accompanying the Elliott bill and complained, among other things, that the bill, by limiting the ban on hot cargo agreements to the trucking industry, "would seem to put a stamp of approval upon all other 'hot cargo' agreements." H.R. Rep. No. 741, 86th Cong., 1st Sess. 97 (1959), I Leg. Hist. 855 (dissenting views). Representatives Landrum and Griffin likewise dissented (*id.* at 99–100, I Leg. Hist. 857–858), and Representative Landrum—who had presided over the hearings concerning secondary subcontracting agreements in the construction industry and, together with other members of the committee, had called for a change in the existing law (*House Hearings* 2333–2334, 2368–2370)—argued on the House floor that the ban on secondary agreements should be extended to all industries. 105 Cong. Rec. 14343 (1959), II Leg. Hist. 1518.

The opponents of the Elliott bill rallied to pass the substitute Landrum-Griffin bill; its provisions made it unlawful for *any* labor organization and *any* employer to enter into an agreement whereby the employer agrees to "cease doing business with any other person." H.R. 8400, 86th Cong., 1st Sess. § 705(b)(1) (1959), I Leg. His. 683. Opponents of the Landrum-Griffin bill immediately complained that its broader prohibitions "would also outlaw legitimate forms of collective agreement." [18]

Had the Landrum-Griffin bill been enacted, the union signatory clauses at issue here would clearly have been unlawful. However, when the House and Senate bills were referred to the Conference Committee, the Senate conferees insisted on several changes in order to protect "traditional and essential rights of workingmen seeking to improve conditions of employment." [19] In particular, with respect to the ban on secondary agreements, the Senate insisted on exemptions for the garment industry and for agreements relating to work to be done at the site of a construction project. Thus, Senator Kennedy, the

[18] 105 Cong. Rec. 16590 (1959), II Leg. Hist. 1708 (joint statement of Rep. Thompson and Sen. Kennedy).

[19] 105 Cong. Rec. 17898 (1959), II Leg. Hist. 1431 (remarks of Sen. Kennedy).

chairman of the Conference Committee, reported back to his colleagues that "[t]he Senate insisted upon a qualification * * * for agreements relating to work to be done at the site of a construction project," and that this qualification, like the garment industry proviso, was "necessary to avoid serious damage to the pattern of collective bargaining in [the industry]." 105 Cong. Rec. 17899 (1959), II Leg. Hist. 1432. He added (105 Cong. Rec. 17900 (1959), II Leg. Hist. 1433):

> [The construction industry proviso] is intended to preserve the present state of the law * * * with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.
>
> * * * * *
>
> Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e).[20]

The Conference Committee managers for the House expressed the same view, emphasizing that the final bill would not change the law respecting the validity of construction site subcontracting agreements since, "[t]o the extent that such agreements are legal today * * * the proviso would prevent such legality from being affected by section 8(e)" H.R. Rep. No. 1147, 86th Cong, 1st Sess. 39 (1959), I Leg Hist 943.[21]

---

[20] At the same time, Senator Kennedy emphasized that the construction industry proviso "affects only section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4)" with respect to "strikes and picketing to enforce the contracts excepted by the proviso." 105 Cong. Rec. 17900 (1959), II Leg. Hist. 1433. He also noted that, since "the proviso relates only to the 'contracting or subcontracting of work to be done at the site of the construction,'" the "proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do work at the jobsite." *Ibid.*

[21] See also, 105 Cong. Rec. 18128 (1959), II Leg. Hist. 1715 (remarks of Rep. Barden); 105 Cong. Rec. 18135 (1959), II Leg. Hist. 1721 (remarks of Rep. Thompson); 105 Cong. Rec. 19849 (1959), II Leg. Hist. 1823 (post-legislative memorandum by Sen. Dirksen); 105 Cong. Rec. 19772 (1959), II Leg. Hist. 1858 (post-legislative memorandum by Sen. Goldwater); Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 1086, 1119 (1960) ("This provision thus approves the general practice of the building trades to secure from a contractor a promise that he will not subcontract work on the job site to a nonunion contractor.").

Thus, although Congress was urged to pass legislation banning secondary subcontracting agreements in the construction industry and the House passed a bill that would have had this effect, the Senate refused to agree and successfully insisted on a proviso designed "to preserve the *status quo*" (*National Woodwork Mfrs. Ass'n* v. *NLRB*, *supra*, 386 U.S. at 637) with respect to such agreements.

C. The Construction Industry Proviso is Part of a Legislative Scheme that Accommodates the Act's Restraints on Labor Organizations to the Special Circumstances of the Construction Industry While Providing Some Limits on Top-down Organizing

The final bill that emerged from the Conference Committee in 1959 reflected a number of different interests: on the one hand, interests in accommodating the Act to the special employment patterns of the construction industry and in ameliorating legal constraints that uniquely affected unions seeking to organize construction employees and to preserve negotiated employee benefits in that industry; on the other, interests in maintaining some restraints on top-down organizing and, more generally, on the power of labor organizations with respect to employees who did not wish to be union members.

To understand the role of the Section 8(e) proviso in the overall scheme, it is essential to take note of the peculiarities of the construction industry as Congress understood them and of the way in which organizational and representational activities of construction industry unions are affected by other provisions of the Act, notably Sections 8(f) and 8(b)(7)(C) of the Act, 29 U.S.C. 158(f) and 158(b)(7)(C). Such a review reveals, contrary to petitioners' contentions, (1) that the proviso was designed to do more than merely forestall jobsite friction by empowering unions to negotiate clauses that would keep nonunion workers off the site whenever union workers are there, and (2) that sections of the Act other than Section 8(e) placed constraints on the ability of construction unions to engage in top-down organizing.

1. *Secondary subcontracting agreements relating to the contracting of jobsite work serveral legitimate purposes*

a. The problem of accommodating the provisions of the Act to the special circumstances of the construction industry had been the subject of intensive congressional review, commencing in 1951 [22] and culminating in the hearings on the 1959 amendments. Congress learned from this inquiry that employers in the construction industry generally looked to union hiring halls as the source of skilled labor for their projects and negotiated contracts of from one to three years' duration prescribing the terms upon which union labor would be supplied. Such agreements assured employers that a supply of skilled craftsmen would be available for immediate employment at those stages of a given project when the skills in question were required and facilitated the calculation of labor costs for the purpose of intelligently bidding on construction contracts. Such area-wide contracts also assured that the employees who were represented by the union and worked out of the union hiring hall would enjoy meaningful collective bargaining rights and unform terms and conditions of employment even while moving from jobsite to jobsite and employer to employer. [23]

---

[22] *To Amend the National Labor Relations Act, 1947, with Respect to the Building and Construction Industry: Hearings on S. 1973 Before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare*, 82d Cong., 1st Sess. 29–37, 45–59 (1951).

[23] S. Rep. No. 187, 86th Cong., 1st Sess. 27–29 (1959), I. Leg. Hist. 423–424; H.R. Rep. No. 741, *supra*, at 19–20, I. Leg. Hist. 777–778; 105 Cong. Rec. 15541 (1959), II Leg. Hist. 1577–1578 (remarks of Reps. Thompson and Udall, incorporating speech by Speaker Rayburn); *Senate Hearings* 136–137 (statement of Archibald Cox); *Senate Hearings* 202–205, 215 (statement of Frank J. Rooney); *Senate Hearings* 492–502 (statement of Richard J. Gray); *House Hearings* 573–586 (statement of Frank J. Rooney); *House Hearings* 595 (statement of William E. Dunn); *House Hearings* 1727–1733 (statement of Richard J. Gray).

This pattern of bargaining did not, however, comport with legal doctrines developed with respect to other industries, barring so-called "prehire" agreements. See S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959), I Leg. Hist. 424; H.R. Rep. No. 741, *supra*, at 19, I Leg. Hist. 777. Convinced that such agreements were useful to employers and employees alike in the construction industry, the Conference Committee adopted, as part of Section 8(f), the provision in the Senate bill legitimating such prehire agreements in that industry. H.R. Rep. No. 1147, *supra*, at 42, I Leg. Hist. 946.[24]

Section 8(f) permits construction unions that have not yet established their majority status to negotiate agreements covering employees who are "engaged (or who, upon their employment, will be engaged) in the building and construction industry." As the District of Columbia Circuit has pointed out, however (*Donald Schriver, Inc.* v. *NLRB*, 635 F.2d 859, 880 (D.C. Cir. 1980), cert. denied, No. 80–1257 (May 4, 1981), petition for reconsideration pending) "[s]tanding alone * * * such agreements are incapable of protecting the conditions they establish" because subcontracting is the usual practice in the construction industry and the workers are typically not attached to one particular employer but "are organized in employment pools to be hired out either by the contractor with whom they have an agreement or by a subcontractor to whom the work is

---

[24] Congress' willingness so to exempt the construction industry from the Act's usual proscriptions against bargaining in advance of a union's establishing majority support among employees actually working on the job (see, *e.g.*, *ILGWU* v. *NLRB*, 366 U.S. 731, 733 (1961); *Crown Cork & Seal Co.*, 182 N.L.R.B. 657, 662 (1970)) was predicated in part upon its acceptance of the unanimous testimony at the hearings that, whatever might be the case with other unions who might seek to take advantage of Section 8(f), the major construction unions, who for decades had been negotiating area agreements with employers, were in fact the choice of the majority of the employees working under the agreements. *Senate Hearings* 137 (statement of Archibald Cox); *id.* at 192–193, 202–204 (statement of Frank J. Rooney); *id.* at 498 (statement of Richard J. Gray); *House Hearings* 574–575, 581–582, 586, 595–596 (statement of Frank J. Rooney); S. Rep. No. 187, *supra*, at 28, I Leg. Hist. 424.

assigned." [25] Thus construction workers do not share the interest of industrial sector employees in forbidding contracting out altogether; rather "their interest is in assuring that their collective bargaining agreement is respected on each jobsite upon which their employer works whether he does the work himself or subcontracts it out" (*id.* at 881).

By permitting contract clauses requiring that all construction site work be performed by contractors who are bound to honor the terms of the applicable area-wide agreement with the appropriate union, the construction industry proviso seeks to preserve the means that unions and employers in that industry had adopted for insuring not only that labor relations on particular job sites are harmonious (see subpoint b, *infra*) but also that the pool of workers represented by the union will enjoy the opportunities for regular employment and the continuity in wages, fringe benefits, and other terms and conditions of employment enjoyed by employees in more stable industries.[26]

---

[25] As the court below explained (W. & R. Pet. App. 27): "The employer has an option on any given project to use some of his own workers, to subcontract to an employer who will use those same workers, or to subcontract to one who will use others represented by the same union, a different union, or no union."

[26] Petitioners inaccurately maintain that legitimate union interests are fully served by primary union standards clauses—*i.e.*, clauses that restrict subcontracting clauses in the construction industry (W. & R. Br. 40; Oregon-agreement—and that therefore the union interest in maintaining contract benefits is not a valid basis for justifying secondary union signatory subcontracting clauses in the construction industry (W. & R. Br. 40, Oregon-AGC Br. 38). Primary union standards clauses, however, are not within Section 8(e) at all and may be negotiated by any union (see *National Woodwork Mfrs. Ass'n* v. *NLRB*, *supra*, 386 U.S. at 644–645 & n. 40).

The construction industry proviso, by contrast, affords construction unions a limited right to negotiate subcontracting agreements that implicate the signatory employers in union efforts to obtain contract benefits for the union-represented pool of casual employees generally. See *NLRB* v. *National Maritime Union*, *supra*, 486 F.2d at 914 (distinguishing the rights of construction and maritime workers in light of the proviso). Union standards clauses are insufficient to secure the legitimate secondary objectives protected by the proviso. Thus, the interest of the pool of union-represented employees in securing job opportunities under the terms of the particular agreement

b. As this Court noted in *Connell* (421 U.S. at 629; footnote omitted), the construction industry proviso was apparently also intended to serve as "a partial substitute for an attempt to override this Court's decision in *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675 (1951)."

At the time Congress was considering the proper scope of Section 8(e), it had before it several proposals—*e.g.*, § 702(d) of H.R. 8342, 86th Cong., 1st Sess. (1959), I Leg. Hist. 752–753 (the Elliott bill)—that would effectively overrule the holding in *Denver* that picketing a general contractor's entire project in order to protest the presence of a nonunion subcontractor is an illegal secondary boycott. "It was partly in this frame of reference that the [construction industry] proviso to Section 8(e) was written * * *." 105 Cong. Rec. 20005 (1959), II Leg. Hist. 1861 (remarks of Rep. Kearns).

---

negotiated on their behalf is plainly frustrated if jobsite work is awarded to employers who merely match union standards but do not hire these employees in accordance with the referral provisions in the union contract.

Similarly, the union interest in securing continuity of pension, health care, and other fringe benefits for the union-represented pool of employees cannot be assured unless work is awarded to employers signatory to the particular union's agreement. For in the construction industry, fringe benefits typically are provided through contributions to a trust fund jointly administered by the union and employer parties to a collective bargaining agreement, pursuant to Section 302 of the Labor-Management Relations Act of 1947 (Taft-Hartley Act), 29 U.S.C. 186. Section 302 forbids payments into such funds except if "specified in a written agreement with the employer." See *Walsh* v. *Schlecht*, 429 U.S. 401, 403–404 n. 1 (1977). Accordingly, unless the subcontractor performing the construction work is signatory to the applicable union contract, it cannot contribute to the fringe benefit trust funds. Further, the alternative approved in *Walsh*—requiring a signatory contractor who subcontracts to a nonsignatory firm itself to make contributions measured by the hours worked by the subcontractor's employees—solves the problem only in part. The flow of contributions into the fund is thereby maintained, but because of the difficulty of ascertaining which signatory employer and which union-represented employees would have been awarded the work in the absence of the subcontract to the nonunion firm, there is no practical means to credit any particular member of the union-represented pool of employees with hours worked for the purposes of later benefit calculations.

Those wishing to overrule *Denver* criticized it for numerous reasons, *e.g.*, that contractors and subcontractors working together on a common enterprise at a single site are not the sort of neutrals that the secondary boycott provisions were designed to protect; that the various craftsmen, although working for different employers, have a close community of interest as they work side by side, and the wages and working conditions of one trade may, in those circumstances, affect the others; that the *Denver* rule unfairly denies construction workers the right, enjoyed by industrial workers, to engage in economic picketing at one's place of employment; and that, in contrast to "true" secondary boycott situations, construction site disputes are confined to a limited area and do not affect employers operating in geographically distinct markets.[27] That the *Denver* rule could result in uneasy employee relationships on the jobsite owing to the presence of nonunion workers in the midst of union workers was an additional criticism, although, as the court below observed (W. & R. Pet. App. 33), the "problem of shoulder-to-shoulder friction between union and nonunion workers" at the job site received "very little emphasis."

The proviso was a response to the *Denver* criticisms insofar as it permitted unions to enter into agreements that would prohibit the subcontracting of jobsite work to nonunion firms, although they still could not picket the entire site to protest the presence of a nonunion firm actually on the site. But since, as we have shown (pages 22–24, *supra*), the proviso served other important purposes as well, and since, even as a response to *Denver*, it was only partly concerned with "shoulder-to-shoulder friction," there is no merit to petitioners' contention that the proviso covers only subcontracting clauses focused solely on preventing the employment of union and nonunion workers on the same jobsite at the same time. Indeed, this claim would

---

[27] 105 Cong. Rec. 17881 (1959), II Leg. Hist. 1425 (remarks of Sen. Morse); 105 Cong. Rec. 15541 (1959), II Leg. Hist. 1577 (memorandum by Reps. Thompson and Udall); 105 Cong. Rec. 15551–15552 (1959), II Leg. Hist. 1588 (memorandum by Rep. Elliott); 105 Cong. Rec. 15852 (1959), II Leg. Hist. 1684 (remarks by Rep. Goodell).

attribute to Congress an intent to protect only clauses that, so far as the evidence shows, no one had ever entered into, or even drafted.

2. *Construing the proviso as privileging subcontracting clauses like those at issue here does not leave construction unions free to engage in unlimited top-down organizing*

Petitioners contend (W. & R. Br. 15–17, 27–30; P.N.W. Br. 13–14; Oregon-AGC Br. 20–29) that the subcontracting clauses here have a "top-down" organizing effect in that they would require an employer, in order to obtain a subcontract, to force its employees to become members of the union and to accept the union as their representative, not only on the first project but on all of that employer's future projects in the area. Therefore, they contend, to interpret the construction industry proviso as privileging subcontracting clauses that are negotiated or sought in the context of a collective bargaining relationship, but are not limited to jobsites where union and nonunion employees are working together, ignores the congressional concern about "top-down" organizing which the *Connell* Court emphasized. This argument misconceives the operation of subcontracting clauses in the construction industry and the nature of the accommodation which Congress made in that industry.

As noted above (pages 15–21, *supra*), persons affected by secondary subcontracting agreements complained that collective bargaining agreements containing such clauses created an unfair, "top-down" organizing pressure on the organizational rights of employees and the reciprocal duties of employers, and they sought legislative relief—the outlawing of collectively-bargained secondary subcontracting agreements—that Congress declined to give. Congress did not, however, disregard the interests of employers and employees who might be affected by such clauses. Rather, it decided to use other statutory means to moderate the effects of competition for jobs and to assure that the Act's policies of employee free choice and majority rule would be given effect in a manner suited to the practical realities of the construction industry.

Thus, a subcontractor cannot be subjected to unlimited picketing to force it to enter into a union agreement regardless of the wishes of its employees. Unless the picketing union files an election petition within a reasonable period of time, not to exceed 30 days, such picketing would be a violation of Section 8(b)(7)(C) of the Act.[28] Moreover, should the subcontractor enter into a prehire agreement with the union, the express terms of Section 8(f) of the Act permit its employees to challenge the union's representative status by filing an election petition with the Board. And, the subcontractor itself, if

---

[28] Contrary to petitioners' assertion (*e.g.*, W. & R. Br. 20–21; P.N.W. Br. 31), picketing for a prehire agreement, as well as picketing for a conventional Section 9(a) agreement, is governed by the terms of Section 8(b)(7)(C) and is not unlawful altogether. It is true that Congress gave assurances, in connection with Section 8(f), that it did not "authorize" construction unions that had not yet established their majority status to picket for such agreements. H.R. Rep. No. 1147, *supra*, at 42, I Leg. Hist. 946; 105 Cong. Rec. 18128 (1959), II Leg. Hist. 1715 (remarks of Rep. Barden, a House floor leader and one of the conferees) incorporating 104 Cong. Rec. 11308 (1958) (colloquy of Senators Holland and Kennedy). However, these assurances were not equivalent to forbidding stranger picketing (105 Cong. Rec. 18134–18135 (1959), II Leg. Hist. 1721 (remarks of Rep. Thompson, also a conferee and House floor manager), and for this reason were unsatisfactory to the industry. *Senate Hearings* 215 (statement of Frank J. Rooney); *House Hearings* 610 (statement of Frank J. Rooney). Rather, the compromise that emerged in 1959 was to allow picketing for a prehire agreement subject to the limitations of Section 8(b)(7)(C). Such picketing thus loses all protection once it becomes clear that the union has no intention of ever putting its majority status to the test of an election, *i.e.*, after the 30-day period has expired without the filing of an operative election petition, or when the circumstances are such that an election satisfying the requirements of Section 8(b)(7)(C) would be an impossibility. See *Local 542, Int'l Union of Operating Engineers (R. S. Noonan, Inc.)*, 142 N.L.R.B. 1132, 1135 (1963), enforced, 331 F.2d 99, 105 (3d Cir.), cert. denied, 379 U.S. 889 (1964); *Local 86, Brotherhood of Painters (Carpet Control, Inc.)*, 216 N.L.R.B. 1127, 1132–1133 (1975). See also *NLRB* v. *Local 103, Iron Workers*, 434 U.S. 335 (1978) (picketing to enforce prehire agreement is subject to Section 8(b)(7)(C)); *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 186 (1978) (picketing to secure prehire agreement "was at least arguably subject to the prohibition on recognitional picketing contained in § 8(b)(7)(C)").

it does not have a stable workforce among whom the union has secured a majority, is free under the Act to repudiate the agreement at any project on which the union has not demonstrated that it represents a majority of its employees. See *NLRB* v. *Local 103, Iron Workers*, 434 U.S. 335 (1978); *Giordano Construction Co.*, 256 N.L.R.B. No. 10 (May 18, 1981), 107 L.R.R.M. 1164, 1165–1166.[29]

In addition, even where construction unions are successful in negotiating collective bargaining agreements that require general contractors and subcontractors to look to the union hiring hall as the source of construction labor. Sections 8(a)(3) and 8(b)(2) of the Act, 29 U.S.C. 158(a)(3) and 158(b)(2), require that the union refer members and nonmembers alike to available jobs[30] and, further, limit the obligations of union membership that may be required after seven days under lawful union security clauses to the normal financial obligations of membership.[31] Thus, nonunion employees are not frozen out of the job market by these agreements as petitioners maintain.

Finally, because Congress did not overrule the *Denver Building Trades* decision (see pages 25–26, *supra*), employees working for firms with whom a construction union has a primary dispute are protected against secondary picketing designed to force them off their current job. As the court below stated (W. & R. Pet. App. 41–42), in a holding not questioned here, even where construction unions have negotiated secondary clauses lawful under the proviso, they may not enforce them by picketing or other forms of self help, but must rely on litigation to obtain relief for the contract violation. See H.R. Rep. No. 1147, *supra*, at 39, I Leg. Hist. 943; 105 Cong.

---

[29] Of course to the extent that the subcontractor employs a stable complement of employees, a majority of whom support the union, its executing and honoring the union's contract on successive projects presents no problem of top-down organising but is fully consistent with the majoritarian principles of Section 9(a) of the Act. See *Hageman Underground Construction*, 253 N.L.R.B. 60, 62–63 (1980).

[30] See *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40–42 (1954); *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667, 673–677 (1961).

[31] See *NLRB* v. *Hershey Foods Corp.*, 513 F.2d 1083, 1085–1087 (9th Cir. 1975); *Local 1104, Communication Workers of America* v. *NLRB*, 520 F.2d 411, 417–420 (2d Cir. 1975), cert. denied, 423 U.S. 1051 (1976).

Rec. 19772 (1959), II Leg. Hist. 1830 (post-enactment memorandum of Sen. Goldwater).

These protections insure that Congress' approval of collectively-bargained secondary subcontracting agreements relating to construction site work does not, contrary to petitioners, entail taking the ultimate decision concerning union representation from employees and giving it to employers. Consideration of the agreements here confirms this conclusion. The agreements, which were sought from employers with whom the unions had longstanding bargaining relationships, require signatory employers to obtain their employees from the unions' hiring halls (J.A. I 37–39; J.A. II 17–24). Accordingly, a nonunion employer who signs the agreement in order to obtain work on a particular project would employ workers who were already members of the union, or who, although not union members, at least were willing to seek work through the union hiring hall and to accept the financial obligations of membership after seven days, as a condition of further employment under a valid union security provision. If the signatory employer already has a complement of employees, these employees would be free to choose whether to accept "by name" referrals (J.A. I 37–38; J.A. II 19) through the hiring hall—and then either to work under the contract or to exercise their Section 8(f) right to repudiate it—or to seek employment elsewhere. In any event, the employees hired in accordance with the contract's nondiscriminatory terms would make the ultimate decision with respect to unionization.

Finally, to the extent that, notwithstanding these various protections, collectively-bargained union signatory subcontracting clauses nevertheless exert some top-down organizing pressure upon employees, it must be recognized, as the court below concluded (W. & R. Pet. App. 35; footnote omitted):

> There is some "top-down organizing" effect in *any* subcontracting agreement, including those which all parties must admit would be valid and within the proviso. When there are union workers on the job next to nonunion workers, the enforcement of a subcontracting clause is

still likely to have a top-down organizing effect. The answer to this point is simply that Congress recognized that the community of interests on the jobsite justified the top-down organizational consequences that may attend the protection of legitimate collective bargaining objectives there. The proviso is, after all, an exception to the general thrust of the 1959 amendments.

D. Granting Proviso Protection to Union Signatory Subcontracting Clauses Sought or Obtained in the Context of a Collective Bargaining Relationship is Consistent With this Court's Decision in *Connell*

1. In *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100, supra*, an antitrust case, the Court was not asked, as here, to decide the legality of secondary construction site subcontracting clauses sought or obtained in the kind of established collective bargaining relationships traditional in the construction industry. Rather, the Court was confronted with a novel organizational tactic: "stranger" picketing aimed at pressuring selected employers into entering an agreement with a single term—a union signatory subcontracting clause falling within the literal words of the construction industry proviso—and deliberately structured to avoid any possible claim that the union sought or obtained this agreement in the context of a collective bargaining relationship.

Thus, the union picketed Connell, as well as other carefully targeted general contractors working in the Dallas, Texas, area, for the sole purpose of compelling such contractors to agree that, in letting subcontracts for the performance of mechanical work, they would deal only with firms that were parties to that union's current collective bargaining agreements. The union had no collective bargaining relationship with Connell, whether under Section 8(f) or Section 9(a) of the Act, and the unior expressly disclaimed any interest in representing any of Connell's employees. Further, Connell, like the other targeted employers, uniformly subcontracted its mechanical work to other employers and never itself employed any workers in the craft the union represented. Because, on these facts, the union's picketing demonstrably had no recognitional or organizational

purpose with respect to Connell's employees, it fell outside the restrictions that Section 8(b)(7) places on recognitional and organizational picketing. See *Dallas Building & Construction Trades Council* v. *NLRB*, 396 F.2d 677, 682 n.8 (D.C. Cir. 1968) ("picketing is permissible [under Section 8(b)(7)] if the coverage of the proposed contract is limited to the type of work which is never performed by the general contractor's own employees"). And this was precisely the union's purpose.[32]

As a result of the "stranger union" picketing, Connell entered into the secondary subcontracting agreement under protest and filed suit to annul the agreement as an illegal restraint of trade under the Sherman Act. The union defended on the ground that the agreement sought was protected by the express words of the construction industry proviso to Section 8(e) of the NLRA, and that the picketing was therefore lawful under Section 8(b)(4)(A), 29 U.S.C. 158(b)(4)(A) (see pages 36–43, *infra*). Since the union had already demonstrated the absence of any objective to establish any form of a collective bargaining relationship (and thereby evaded the reach of Section 8(b)(7)), acceptance of this argument would have given the union a means to engage in "stranger" picketing for secondary agreements with impunity;[33] and because the union represented no employees of Connell, it was subject to none of the pressures

---

[32] As the court of appeals explained in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 483 F.2d 1154, 1157–1158 (5th Cir. 1973), rev'd on other grounds, 421 U.S. 616 (1975), the case was "another phase of the struggle between the trade unions in the construction industry and general contractors in Dallas," and represented a conscious attempt by the unions to refine their picketing tactics in a manner that would permit them to exploit the limitations of Section 8(b)(7) that had been noted in *Dallas Building Trades, supra*. See also W. & R. Pet. App. 22 n. 24.

[33] Such a result would also mean that construction workers would enjoy the same rights as garment workers to engage in unlimited picketing to obtain secondary subcontracting agreements outside of any contemplated collective-bargaining relationship between the picketing union and the "stranger" employer. See *Danielson* v. *Joint Board of Coat, Suit & Allied Garment Workers' Union*, 494 F.2d 1230 (2d Cir. 1974); *Joint Board of Coat, Suit & Allied Garment Workers' Union*, 212 N.L.R.B. 735 (1974)

and incentives that are a normal part of the collective-bargaining process.[34]

The employer in *Connell* responded to the union's argument for proviso protection by contending that, despite the proviso's unqualified language, "Congress intended only to allow subcontracting agreements within the context of a collective bargaining relationship * * * [and] did not intend to permit a union to approach a 'stranger' contractor and obtain a binding agreement not to deal with nonunion subcontractors" (421 U.S. at 627–628).

Against this background and with the issues thus framed, this Court declined to read the construction industry proviso as broadly as the union urged, "[a]bsent a clear indication that Congress intended to leave such a glaring loophole in its restrictions on 'top-down' organizing." 421 U.S. at 633. Accordingly, the Court construed the construction industry proviso exemption as applicable "only to agreements in the

---

(construing Section 8(b)(7)(C) in light of the garment industry proviso to Section 8(e)). As the Court noted in *Connell*, however, Congress showed a greater solicitude for the problems confronting garment workers and their unions, and did not intend that construction workers should enjoy precisely the same rights. 421 U.S. at 628–630, 633 n.13 (See also page 20, note 10, *supra*.) Thus, the second proviso to Section 8(e) privileges secondary subcontracting agreements in the garment industry, and unlike the construction industry proviso exempts efforts to *enforce* those agreements from the prohibitions of the Act, including Section 8(b)(4)(B), 29 U.S.C. 158(b)(4)(B).

[34] As the court below observed (W. & R. Pet. App. 36): "If the union already represents the contractor's employees, the employer may resist any attempts to secure a subcontractor agreement by asserting its own bargaining position and presenting its own demands." For example, the employer could offer other benefits such as higher wages, instead of the subcontracting clause, which may be more attractive to the employees represented by the union. (See *Dallas Building & Construction Trades Council* v. *NLRB*, *supra*, 396 F.2d at 681, where the employer association rejected secondary clauses in bargaining with the locals that were the recognized representatives of their employees, and in exchange the locals accepted contracts with other economic benefits.) The employer thus may be able to put a brake on the union's economic pressure which, absent an established bargaining relationship with the union, it could not impose.

context of collective-bargaining relationships" (*ibid.*).[35] The Court thereby assured that stranger picketing for secondary subcontracting clauses could not be used as an unlimited means for "top-down" organizing. Rather, picketing a contractor whose employees the union sought to represent for a collective-bargaining agreement containing a secondary subcontracting clause would continue to be restricted under Section 8(b)(7)(C) to a reasonable period, not to exceed 30 days, unless the picketing union had filed an election petition;[36] and the new tactic of picketing for a secondary clause from a contractor who had no employees in the classifications covered by the agreement would be proscribed altogether by Section 8(b)(4)(A).[37]

---

[35] Similarly, with respect to the union's potential antitrust liability, the Court recognized that significantly different antitrust issues would have been presented had the subcontracting clause been proffered as part of a lawful collective bargaining agreement with Connell. As the Court stated (421 U.S. at 625–626; citations omitted): "There can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective bargaining agreement. In this case [the union] had no interest in representing Connell's employees. The federal policy favoring collective bargaining therefore can offer no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firms from the subcontracting market."

[36] See *Building & Construction Trades Council of Philadelphia (Samuel E. Long, Inc.)*, 201 N.L.R.B. 321, 323–325 (1973), enforced mem., 485 F.2d 680 (3d Cir. 1973), cert. denied, 416 U.S. 937 (1974).

[37] Where, as here, a union has established a Section 9(a) bargaining relationship with a contractor, picketing of that contractor, as petitioners note (W. & B. Br. 49; Oregon-AGC Br. 47–48), is not subject to the restrictions of Section 8(b)(7), which only proscribe picketing "having as its target forcing or requiring an employer's *initial* acceptance of the union as the bargaining representative of his employees." *NLRB* v. *Local 103, Iron Workers*, 434 U.S. 335, 343 (1978), quoting from *Building & Construction Trades Council of Santa Barbara (Sullivan Electric Co.)*, 146 N.L.R.B. 1086, 1087 (1964) (emphasis added). Section 7 of the Act, 29 U.S.C. 157 gives construction unions, who have established a Section 9(a) bargaining relationship with an employer the right, enjoyed by other unions who are the employers' Section 9(a) representatives, to engage in peaceful picketing or other economic pressure in support of their lawful contract demands. See

2. The Court did suggest one possible exception to the proscription against secondary subcontracting agreements outside of a collective-bargaining relationship, noting that, "in light of congressional references to the *Denver Building Trades* problem," the protection of the Section 8(e) proviso extends "possibly to common-situs relationships on particular jobsites as well." 421 U.S. at 633. However, contrary to petitioners, this reference to the *Denver Building Trades* problem does not support their contention (W. & R. Br. 37–39; P.N.W. Br. 50–51) that the Court thereby narrowly construed the proviso to privilege *only* subcontracting clauses aimed at precluding nonunion employees from working alongside union employees. Petitioners read conjunctively the Court's statement that the authorization of the Section 8(e) proviso "extends only to agreements in the context of collective-bargaining relationships and, in light of congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well." 421 U.S. at 633. But, it is plain that the statement is properly read disjunctively. Moreover, petitioners' conjunctive reading of the Court's statement would necessarily mean that the function of the proviso would be limited to alleviating friction caused by having union and nonunion employees working on the same jobsite (see W. & R. Br. 30–33; P.N.W. Br. 35–39; Oregon-AGC Br. 33–35), but, as we have shown (pages 22–27, *supra*), the proviso's purpose was broader than that. Indeed, *Connell* acknowledges that, in *National Woodwork Mfrs. Ass'n* v. *NLRB*, *supra*, the Court had ascribed a broader purpose to this proviso—*i.e.*, a recognition of "the close community interests" on the jobsite (see 421 U.S. at 630). That community of interests among union-represented employees can be jeopardized by subcontracts to firms who do not abide by the union agreement regardless of whether those employees happen to be on the jobsite at the same time that nonunion employees are there (see page 24 note 26, *supra*).

NLRB v. *Insurance Agents' Union*, 361 U.S. 477, 489 (1960). In such circumstances, however, as noted above (page 33, note 34, *supra*), the employer can resort to bargaining strategies of its own in response to union demands.

II. SECTION 8(b)(4)(A) OF THE ACT DOES NOT PROSCRIBE PICKETING TO OBTAIN UNION SIGNATORY SUBCONTRACTING CLAUSES PRIVILEGED BY THE CONSTRUCTION INDUSTRY PROVISO

Petitioner Woelke (Br. 43–49) and amicus Chamber of Commerce (Chamber Br. 6–22) urge that, even if the proviso is properly read to privilege union signatory subcontracting clauses, that privilege extends only to agreements that have been entered into voluntarily.[38] As every court of appeals which has considered that question has held,[39] however, there is simply no basis in the language of the Act to support that contention.

1. The express terms of Section 8(b)(4)(A) prohibit coercing any person "to enter into any agreement which is prohibited by section 8(e)." As the court below observed (W. & R. Pet. App. 40–41), the negative implication of this language is that it is lawful to picket to secure an agreement which, by virtue of

---

[38] This issue is presented only on the facts of *Woelke & Romero* since there is no claim that the Engineers in *Pacific Northwest* picketed to secure the subcontracting clause contained in their collective-bargaining agreement with AGC. Although addressed by the court of appeals (W. & R. Pet. App. 40–41), the issue was not raised before the Board, either by the General Counsel or by Woelke, the charging party in that case (W. & R. Pet. App. 81–82). Accordingly, Section 10(e) of the Act, 29 U.S.C. 160(e), precludes consideration of it on review. See, *e.g.*, *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311–312 n.10 (1979). Therefore, this issue is not properly before the Court and we suggest that, as to it, certiorari was improvidently granted. Because the grant of certiorari was not limited, however, we address it here.

[39] *Essex County & Vicinity Dist. Council of Carpenters* v. *NLRB*, 332 F.2d 636, 641 (3d Cir. 1964); *Orange Belt Dist. Council of Painters No. 48* v. *NLRB*, 328 F.2d 534, 537 (D.C. Cir. 1964); *Building & Construction Trades Council* v. *NLRB*, 328 F.2d 540 (D.C. Cir. 1964); *Construction, Production & Maintenance Laborers Union, Local 383* v. *NLRB*, 323 F.2d 422 (9th Cir. 1963) (hereinafter *"Colson & Stevens"*). The Board initially adopted the contrary view, see *Construction, Production & Maintenance Laborers Union, Local 383 (Colson & Stevens Construction Co.)*, 137 N.L.R.B. 1650 (1962), enforcement denied in relevant part, 323 F.2d 422 (9th Cir. 1963), but abandoned it two years later following its uniform rejection by the courts. See *Northeastern Indiana Building & Construction Trades Council (Centlivre Village Apartments)*, 148 N.L.R.B. 854 (1964), enforcement denied on other grounds, 352 F.2d 696, 698–700 (D.C. Cir. 1965).

the construction industry proviso, is not "prohibited by section 8(e)." As the Ninth Circuit explained in *Construction, Production & Maintenance Laborers Union, Local 383* v. *NLRB* (*Colson & Stevens*), 323 F.2d 422, 424 (1963):

> It may well be that § 8(e) itself is addressed only to voluntary agreements; [however] it is not § 8(e) but § 8(b)(4)(A) which prohibits coercion [and] * * * [Section 8(b)(4)(A)] prohibits it only where the object of the coercion is an agreement which is "prohibited" by § 8(e) from voluntarily being reached. * * * [The] two sections read together, as they are intended to be read, say most clearly that if [a subcontracting] agreement may voluntarily be reached, picketing to secure it is not made unlawful.

See also *Essex County & Vicinity Dist. Council of Carpenters* v. *NLRB*, 332 F.2d 636 (3d Cir. 1964).[40]

Not only does the plain language of the amendments permit unions to picket employers to secure collective bargaining agreements containing secondary subcontracting clauses protected by the proviso, but, as we now show, the legislative history of the 1959 amendments also supports the conclusion that this result is in accord with Congress' intent.

2. As we have explained (page 18, *supra*), Congress' efforts to reform the law concerning secondary agreements took place against the background of the decision in *Local 1976, United Brotherhood of Carpenters* v. *NLRB* (*Sand Door*), 357 U.S. 93 (1958). In *Sand Door* the Court held that hot cargo provisions in collective bargaining agreements, although lawful when executed, were nevertheless not a valid defense to a charge of secondary picketing to enforce those clauses. An "important consideration" underlying this holding was the Court's

---

[40] The analysis of the new amendments prepared for a subcommittee of the Senate Committee on Labor and Public Welfare is to the same effect (Senate Committee Section-by-Section Analysis, 86th Cong., 1st Sess. 20 (1959), I Leg. Hist. 966), stating that Section 8(b)(4)(A) makes it an unfair labor practice for a union "to induce an individual or to 'threaten, coerce, or restrain an employer' to enter into an agreement prohibited by section 8(e)" but that "[t]he prohibition against 'hot cargo' agreements does not apply to the clothing and apparel industry, nor to the construction industry relating to work to be done at the construction site."

awareness that, in "the practicalities of the collective-bargaining process," such clauses might themselves have been the result of strike pressure brought to bear on the secondary employer. *Id.* at 106.[41]

Congress was similarly informed of the practicalities of bargaining, and its belief that existing law did not prohibit picketing and other forms of pressure to secure secondary clauses was the impetus for the proposals leading to the enactment of Section 8(b)(4)(A).[42] Thus, in arguing for the necessity of

---

[41] Thus, the Court noted that the employer's agreement to the hot cargo clause "may have been forced upon him by strikes that, if used to bring about a boycott when the union is engaged in a dispute with some primary employer, would clearly be prohibited by the Act." 357 U.S. at 106. Accordingly, the Court concluded, "the freedom of choice for the employer contemplated by § 8(b)(4)(A) is a freedom of choice at the time the question whether to boycott or not arises in a concrete situation calling for the exercise of judgment on a particular matter of labor and business policy." 357 U.S. at 105. The Chamber is therefore mistaken in contending (Br. 6–7) that *Sand Door* indicates that strike pressure to obtain a secondary agreement was unlawful prior to 1959.

[42] Section 8(b)(4)(A) did not appear in either the Senate or House bills, but was added in the Conference. The Senate bill sought to deal with the matter by changing the Act's provisions regulating collective bargaining: as the result of an amendment introduced by Senator Smathers on the floor (105 Cong. Rec. 6730 (1959), II Leg. Hist. 1242–1243), the Senate bill, as passed, stated that the obligation to bargain imposed by Sections 8(a)(5) and 8(b)(3) of the Act included "the mutual obligation * * * to refrain from proposing, insisting upon, or conditioning any contractual provision upon any clause violating the provisions of section 8(e)." S. 1555, 86th Cong., 1st Sess. § 707(b) (1959), I Leg. Hist. 582. Because Section 8(e) in the Senate bill was limited to the trucking industry, its ban on picketing and other forms of "insisting" on secondary agreements was equally limited.

The Landrum-Griffin bill, on the other hand, proposed amending the existing secondary boycott provisions in Section 8(b)(4)(A) of the Taft-Hartley Act, 29 U.S.C. (1958 ed.) 158(b)(4)(A) (which, in relevant part, is similar to Section 8(b)(4)(B) of the present Act) so as to ban any strikes, threats, or other coercive measures with the object of "* * * requiring any person * * * to agree to cease, using * * * or otherwise dealing in the products of any other producer, processor, or manufacturer * * * or *agree to* cease, doing business with any other person * * *." 105 Cong. Rec. 15890 (1959), II Leg. Hist. 1700; H.R. 8400, 86th Cong., 1st Sess., § 705(a) (1959), I Leg. Hist. 681 (emphasis added).

The provision ultimately enacted as Section 8(b)(4)(A)—limiting the ban of the statute only to those strikes and other coercive pressures aimed at

the passage of the Landrum-Griffin bill and the banning of hot cargo agreements in all industries, Representative Griffin complained that, although under existing law it was unlawful to strike to force secondary employers to cease handling certain products or to cease doing business with some other person, "[t]he law * * * does not prohibit resort to the same kind of activity to force such employers to sign contracts or agreements not to handle or transport goods coming from a source characterized by the union as 'unfair.' 105 Cong. Rec. 14347 (1959), II Leg. Hist. 1523. Likewise Representative Rhodes characterized as "a much needed reform" the Landrum-Griffin provisions making it "illegal for unions to insist upon hot cargo clauses being inserted into collective bargaining agreements," and he noted in particular the need to ban such hot cargo clauses in the construction industry. 105 Cong. Rec. 15545 (1959), II Leg. Hist. 1581.

3. Had Congress enacted the Landrum-Griffin bill, it would be unlawful for a construction union—or any union—to picket for any secondary agreement requiring any person to cease doing business with any other person. However, as shown above (pages 18–21 & note 42, *supra*), in the Conference the Senate insisted that agreements relating to the contracting of work to be performed at a construction site be exempted from Section 8(e) and, further, secured the House's acceptance of the Senate view that any ban on picketing to secure secondary agreements should be expressly linked—and limited—by the terms of Section 8(e) itself.

As the sponsors of the compromise in both the House and Senate recognized, the effect of the Conference agreement was to treat the construction industry like any other industry with

---

securing agreements prohibited by Section 8(e)—appears to have been suggested by the Senate conferees. See 105 Cong. Rec. 17333–17334 (1959), II Leg. Hist. 1382–1383 (S. Res. 181, 86th Cong., 1st Sess. (1959), submitted by Sen. Kennedy). In accepting the new measure as part of a compromise that ended the deadlock that had developed in the Conference (see 105 Cong. Rec. 17325–17326 (1959), II Leg. Hist. 1375 (remarks of Sen. Dirksen); 105 Cong. Rec. 17327–17328 (1959), II Leg. Hist. 1377–1378 (remarks of Sen. Kennedy)), the House agreed to the deletion of the phrase "or agree to cease" from the restrictions on secondary picketing now contained in Section 8(b)(4)(B) of the amended Act. H.R. Rep. No. 1147, 86th Cong., 1st Sess. 38 (1959), I Leg. Hist. 942. See *Colson & Stevens, supra*, 323 F.2d at 426–427.

respect to secondary agreements relating to products delivered to the jobsite, with the result that hot goods agreements of the type presented in *Sand Door* were fully subject to the new provisions. With this exception, however, the effect of the Conference agreement was to leave the law with respect to secondary agreements and picketing in the construction industry unchanged. Thus, on the one hand, Congress did not remove the restrictions on secondary jobsite picketing that had already been established under the *Denver Building Trades* case and under *Sand Door*. On the other hand, with respect to the construction site subcontracting agreements protected by the proviso, Congress did not add to the restrictions, but left unchanged existing law, "with respect to the legality of a strike to obtain such a contract." H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39–40 (1959); I Leg. Hist. 943–944; 105 Cong. Rec. 17900 (1959), II Leg. Hist. 1433 (remarks of Sen. Kennedy).

Contrary to the Chamber (Br. 20–21), there is ample "sense" in Congress' compromise decision, on the one hand, to retain the *Sand Door* restrictions on jobsite picketing to enforce secondary clauses and, on the other hand, to continue to permit construction unions to picket to obtain collective bargaining agreements containing secondary subcontracting clauses relating to jobsite work. The former rule limits the opportunity for the kind of secondary jobsite picketing proscribed in *Denver*. The latter rule affords construction unions a channel for protecting their legitimate interests—assurance of continuity of work, uniform contract terms, and avoidance of *Denver* "friction"—by picketing for collective agreements either at contract renewal time (as here) or in the context of lawful organizational and recognitional efforts conducted at the times and within the limitations prescribed by Section 8(b)(7).

The Chamber similarly errs in arguing (Br. 8–10) that analysis of Board decisions prior to the 1959 amendments demonstrates that the Conference agreement did *not* preserve rights of construction unions to picket for secondary agreements relating to the subcontracting of jobsite work because there were no such rights to preserve. First, as we have shown, Congress *believed* that existing law did not bar such picket-

ing.[43] The Chamber's argument thus disregards the canon that "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown* v. *GSA*, 425 U.S. 820, 828 (1976). In any event, contrary to the Chamber's analysis, Board law at the time of the amendments fully supported the congressional understanding regarding the lawfulness of picketing for secondary agreements.

Prior to the enactment of the 1959 amendments, the Board had not resolved the question whether it was a violation of Section 8(b)(4) for a union to strike or picket an employer for an agreement that did not seek to disrupt ongoing projects but only to boycott nonunion firms in the awarding of future contracts. Thus, in *Local 47, Teamsters (Texas Industries, Inc.)*, 112 N.L.R.B. 923 (1955), enforced, 234 F.2d 296 (5th Cir. 1956), the Board, although holding that the union violated Section 8(b)(4) by picketing the general contractors (Bateson and McCann) for a contract clause that required subcontractors to abide by the applicable union agreement, found that the object of the picketing was to force the general contractors to cease doing business with existing and identified subcontractors working on the jobsite (112 N.L.R.B. at 924–925). The Board, however, specifically reserved the question whether the union's picketing also was unlawful "insofar as it sought to regulate future dealings by Bateson and McCann with such subcontractors (not as yet identified) as might refuse to meet the Union's wage standards" (*id.* at 925 n. 2).[44]

---

[43] The statement of Representative Barden that the proviso "permits the making of voluntary agreements" (105 Cong. Rec. 18128 (1959), II Leg. Hist. 1715) is not inconsistent with this view. Moreover, as shown, Congress was aware that "voluntary" agreements to secondary clauses were often the product of economic pressure.

[44] On its facts and rationale, therefore, the conduct proscribed in *Texas Industries* was substantially the same as the conduct proscribed in *Denver Building Trades*, and the fact that the union sought to have the general contractor sign an agreement to oust the offending primary did not materially contribute to the offense. Significantly, the single reference to the *Texas Industries* case in the legislative history is in a *Denver* context: in explaining why they would support the Landrum-Griffin bill on the floor of the House,

Likewise, although in *Bricklayers, Masons & Plasterers (Selby-Battersby & Co.)*, 117 N.L.R.B. 366 (1957), enforcement denied, 259 F.2d 151 (4th Cir. 1958), cert. denied, 359 U.S. 952 (1959), the trial examiner considered the issue reserved in *Texas Industries* and held that Section 8(b)(4) of the Taft-Hartley Act barred picketing that did not seek to disrupt any projects then under construction but only sought an agreement requiring the contractor to refrain in the future from doing business with a class of otherwise unidentified open shop contractors in the Baltimore area (117 N.L.R.B. at 383), the Board dismissed the complaint on other grounds (*id.* at 367–371), and as a result neither the Board nor the reviewing court addressed this issue prior to the 1959 amendments. Accordingly, insofar as Congress, in enacting Sections 8(e) and 8(b)(4)(A), sought to preserve Board law governing picketing aimed at securing secondary subcontracting clauses, it preserved a body of law that did not prohibit picketing for an agreement that sought only to regulate future projects and did not seek to disrupt an existing project.[45]

---

the nine dissenters from the Elliott bill complained that the committee bill's legalization of secondary boycotts at construction sites would weaken existing law making it illegal for a union "to picket a general contractor with whom it has an agreement * * * to force the general contractor to * * * get rid of a subcontractor with whom the union is having a labor dispute." H.R. Rep. No. 741, 86th Cong., 1st Sess. 97 (1959), I Leg. Hist. 855.

[45] *Bricklayers, Masons & Plasterers (Selby-Battersby & Co.)*, 126 N.L.R.B. 1179, 1181–1182 (1959), extensively relied upon by the Chamber (Br. 8–11), was decided on December 29, 1959—more than three months after the President's September 14 approval of the 1959 amendments. Although that decision could be read as holding that a strike to obtain a clause barring subcontracting to nonunion firms violated Section 8(b)(4)(A) of the Taft-Hartley Act, 29 U.S.C. (1958 ed.) 158(b)(4)(A) (which is similar to Section 8(b)(4)(B) of the present Act) (but see 125 N.L.R.B. at 1182), that decision does not illustrate the state of the law prior to the 1959 amendments. Also, it is not in accord with the Board's more considered views concerning the relationship between the newly enacted Section 8(b)(4)(A) and the portion of the former Section 8(b)(4)(A), that, as amended, is now Section 8(b)(4)(B). See *Northeastern Indiana Building & Con-*

In sum, the relevant statutory language and its legislative history both support the Board's conclusion that union signatory clauses regulating the contracting of construction site work, when sought or obtained in the context of a lawful collective bargaining relationship, are privileged by the construction industry proviso to Section 8(e) of the Act and that a union may picket to obtain such clauses without violating Section 8(b)(4)(A). Petitioners' argument to the contrary thus amounts to a request that "the Board or the courts * * * engage in a legislative act" (*Local 357, Teamsters* v. *NLRB*, 365 U.S. 667, 674 (1961)) to prohibit an established and legitimate industrial practice that Congress carefully considered and declined to make unlawful.[46]

---

struction Trades Council (Centlivre Village Apartments), supra, 148 N.L.R.B. at 857–858; *Columbus Building & Construction Trades Council (Merchandise Properties, Inc.)*, 149 N.L.R.B. 82, 83–84 (1964), enforced *sub nom. NLRB* v. *IBEW, Local Union No. 683*, 359 F.2d 385 (6th Cir. 1966); *Los Angeles Building & Construction Trades Council (Church's Fried Chicken)*, 183 N.L.R.B. 1032, 1037–1038 (1970); *Los Angeles Building & Construction Trades Council (B & J Investment Co.)*, 214 N.L.R.B. 562, 563 (1974).

[46] Petitioner Pacific Northwest (Br. 59–60) and amicus Chamber (Br. 20–21) suggest that since, in enacting Section 8(f) and Section 8(b)(7)(C), Congress sought to limit picketing aimed at obtaining a bargaining agreement directly from a subcontractor (see page 38, note 28, *supra*), it is illogical to attribute to Congress an intention to permit unlimited picketing to obtain a collective bargaining agreement containing a union signatory subcontracting clause from a general contractor. As the court below recognized, however, so far as the rights of subcontractors and their employees are concerned, "they are no more affected by a subcontractor agreement achieved by picketing than by one voluntarily entered" into (W. & R. Pet. App. 41). Further, as we have shown (pages 27–30 *supra*), so far as the rights of the general contractor are concerned, unless the picketing union can establish its majority status among the general contractor's employees, picketing aimed at forcing him to enter into any collective agreement *is* subject to the limitations Congress contemplated in enacting Sections 8(b)(7)(C) and 8(f) and where the picketing union, as in *Woelke & Romero*, is concededly the lawful representative under Section 9(a) of the Act, the union can properly claim the same rights as other unions to insist on lawful contract provisions.

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

REX E. LEE
Solicitor General
ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

WILLIAM A. LUBBERS
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
ROBERT E. ALLEN
Acting Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
LINDA SHER
Assistant General Counsel
JOHN H. FERGUSON
Attorney
National Labor Relations Board

JANUARY 1982

APPENDIX

Relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are as follows:

Section 158(b). It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

Section 158(e). It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases

or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

Section 158(f). It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, which is later, or (3) such agreement requires the employer to notify such labor organiza-

tion of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

U.S. GOVERNMENT PRINTING OFFICE : 1982 O - 366-739